
DOHA OPERATING INSTRUCTION

No. 64

Date: July 10, 2001

PROCESSING PROCEDURES FOR CASES SUBJECT TO
10 U.S.C. 986

1. BACKGROUND

This Operating Instruction further implements the appended Deputy Secretary of Defense June 7, 2001 Memorandum "Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001." A portion of the Floyd D. Spence National Defense Authorization Act amended Title 10 of the United States Code to add Section 986, which places restrictions on the granting or renewal of security clearances by the Department of Defense (Enclosure I).

2. RESPONSIBILITIES

a. Personnel Security Specialists assigned to the Special Actions, Policy and Review Division (SAPRD) in Arlington, Virginia, and to the Personnel Security Division (PSD) in Columbus, Ohio, are responsible for the initial identification of those case files covered by 10 U.S.C. 986. When forwarding a case file to Department Counsel for legal review or draft of a Statement of Reasons (SOR), security specialists shall include reference to 10 U.S.C. 986 (as provided for in subparagraphs 3.a. or 3.b. below).

b. Department Counsel, in coordination with the security specialists, are responsible for the final legal determination as to whether the SOR should cite 10 U.S.C. 986.

c. Security specialists are responsible for identifying cases in the case tracking system that are determined, in coordination with Department Counsel, to be subject to 10 U.S.C. 986.

d. Whenever SORs are issued citing 10 U.S.C. 986, the Administrative Support Division shall provide the Applicant with a copy of Enclosure 1.

e. Administrative Judges are responsible for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case.

f. In the event of an appeal raising an issue as to the applicability of 10 U.S.C. 986,

the Appeal Board is responsible for final resolution of the issue.

g. In the event of a final determination that 10 U.S.C. 986 applies to the facts of a case, the Director is solely responsible for the discretionary decision as to whether to recommend to the Deputy General Counsel (Legal Counsel) that 10 U.S.C. 986 should be waived by the Secretary of Defense.

3. SOR FORMAT

Cases pending issuance of an SOR:

a. If facts of a case are covered by either provision (c) (1) of 10 U.S.C. 986 (which disqualifies persons with convictions and sentences of more than one year), or provision (c) (4) of 10 U.S.C. 986 (which disqualifies persons who have been discharged or dismissed from the Armed Forces under dishonorable conditions), the SOR should allege those facts as a normal SOR would and then use the following language as a separate subparagraph under Guideline J:

Due to the facts alleged in subparagraph [], 10 U.S.C. 986 disqualifies you from having a security clearance granted or renewed by the Department of Defense. 10 U.S.C. 986 also provides that, in a meritorious case, the Secretary of Defense may authorize an exception to this prohibition. Should you choose to do so, your response may include information which would support consideration of such a waiver. A copy of 10 U.S.C. 986 is attached.

b. If facts of a case are covered by either provision (c) (2) of 10 U.S.C. 986 (which disqualifies persons who are unlawful users of, or addicted to a controlled substance), or provision (c) (3) of 10 U.S.C. 986 (which disqualifies persons who have been determined to be mentally incompetent), the SOR should allege the facts as a normal SOR would and then use the following language as a separate subparagraph under the appropriate Guideline (H or I):

Due to the facts alleged in subparagraph [], 10 U.S.C. 986 disqualifies you from having a security clearance granted or renewed by the Department of Defense. A copy of 10 U.S.C. 986 is attached.

Cases in which the SOR has already been issued:

c. If the case has not yet been forwarded to an Administrative Judge, Department Counsel shall move to amend the SOR using the paragraph format provided in subparagraphs 3.a. or 3.b. above, as appropriate. Department Counsel shall provide Applicant with a copy of Enclosure 1.

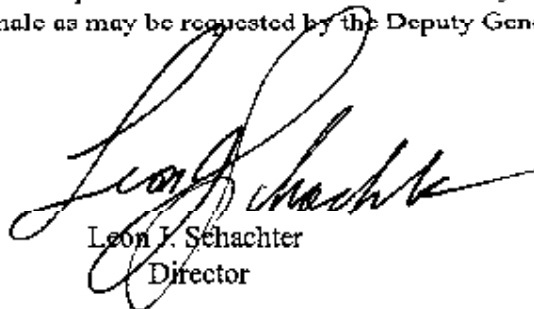
d. If the case has already been forwarded to an Administrative Judge, the Administrative Judge shall issue a *sua sponte* amendment to the SOR using the SOR paragraph format provided in subparagraphs 3.a. or 3.b. above, as appropriate. The Administrative Judge shall provide the Applicant and Department Counsel with a copy of Enclosure 1 together with the amendment and allow 20 days for the Applicant to respond. After receipt of the Applicant's answer to the Amended SOR, the Applicant and Department Counsel shall be given a reasonable time to supplement the record regarding the application of 10 U.S.C. 986 and whether or not circumstances merit a waiver, if appropriate.

Waiver recommendations

e. If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement "I recommend further consideration of this case for a waiver of 10 U.S.C. 986" or "I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986."

f. If the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Appeal Board shall include without explanation either the statement "The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986" or "The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986."

g. In any case in which Administrative Judge, or Appeal Board in the event of an appeal, recommends consideration of a waiver of 10 U.S.C. 986, the Director shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver of 10 U.S.C. 986 by the Secretary of Defense together with such rationale as may be requested by the Deputy General Counsel (Legal Counsel).



Leon J. Schachter
Director

Enclosure (1)



DEPUTY SECRETARY OF DEFENSE

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JUN 7 2001

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN JOINT CHIEFS OF STAFF
GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF
DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Implementation of Restrictions on the Granting or Renewal of Security
Clearances as Mandated by the Floyd D. Spence National Defense
Authorization Act for Fiscal Year 2001

This memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section that precludes the initial granting or renewal of a security clearance by the Department of Defense under the four specific circumstances set forth below. The attached revised adjudication guidelines implement this provision and supplement the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information within DoD. They shall be applied uniformly to all security clearance and access determinations made by DoD and its Components.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

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- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also provides that the Secretary of Defense and the Secretary of the Military Department concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases. Within 60 days from the date of this memorandum, all addressees with the responsibility for granting or denying security clearances or other classified accesses in DoD shall submit to the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD(C3I)), procedures for considering meritorious cases and for submitting them to the Secretary concerned. The ASD(C3I) shall coordinate with all addressees to ensure uniform procedures and will be the lead agency for implementation of this policy within DoD.

Attachment 1 is general guidance for implementing this statute within DoD. Attachments 2, 3, and 4 represent revised copies of the adjudication guidelines, promulgated by the Special Assistant to the President for National Security Affairs in March 1997 pursuant to Executive Order 12968, pertaining to criminal conduct, drug involvement and emotional, mental and personality disorders. The guideline for criminal conduct applies to convictions in both State and Federal courts, including courts-martial.

This policy in this memorandum constitutes a change to DoD 5200.2-R and will be included in the next revision.

Attachments:
As stated



**CRITERIA FOR IMPLEMENTING THE PROVISIONS OF 10 U.S.C. 986 IN ALL DOD
DETERMINATIONS FOR ACCESS TO CLASSIFIED INFORMATION**

- The following applies when implementing the revised DoD adjudication guidelines at Attachments 2, 3 & 4:
 - Provision (1) disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served;
 - Provision (2) does not change the substance of the existing adjudication guidelines relative to current drug involvement. Anyone who is currently an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance;
 - Provision (3) does not change the substance of the adjudication guidelines for emotional, mental, or personality disorders. Anyone who is found to be mentally incompetent (incapable of safeguarding classified information) by a credentialed mental health professional approved by DoD is not considered eligible for a security clearance;
 - Provision (4) disqualifies persons who have been discharged or dismissed from the Armed Forces under dishonorable conditions. This provision has been incorporated in the criminal conduct guideline;
- The statute provides that the Secretary of Defense or the Secretary of the Military Department concerned may authorize a waiver to provisions (1) and (4) in a meritorious case and that such waiver cases shall be reported to the Committees on Armed Services no later than February 1 each year for those granted during the prior year. This waiver authority may not be delegated and does not apply to provisions (2) and (3);
- All military members, active duty, reserve, or national guard are considered to be covered by this policy for the purpose of implementing the statute within DoD;
- The decision as to whether a particular case involves a meritorious case that would justify pursuing a request for waiver shall be the province of the DoD Component concerned (i.e. all Components authorized to grant, deny or revoke access to classified information) beginning with the Director of the Component Central Adjudication Facility (CAF), the Component appellate authority or other appropriate senior Component official;
- Persons with existing clearances or accesses for whom a periodic reinvestigation or request for investigation may reveal a previous, favorably resolved issue involving one or more of the four statutory provisions, regardless of the presence or absence of subsequent disqualifying issues, are subject to the provisions of this statute;

- Because of the need to develop a complete record upon which to evaluate whether a case is covered by provisions (2) or (3) and whether a waiver of provisions (1) or (4) of the statutory provisions is meritorious, all cases potentially covered by the statute shall be fully investigated and adjudicated in accordance with current Executive Order and DoD Directive and Regulatory guidance, including applicable due process procedures;
- When a decision is issued (statement of reasons (SOR)) by a CAF denying or revoking a security clearance in a case involving provisions (1 & 4) of the statute where a waiver is allowed in meritorious cases, the SOR must inform the subject of the waiver provision, provide a copy of the statute, and advise that any appeal to the applicable appellate authority may include information which would support consideration of a waiver under the statute;
- If the result of the current process, without consideration of the statute, would be to grant or renew the security clearance of someone covered by provisions (1) and (4), the authority responsible for making that decision may recommend to the Secretary of Defense or the Secretary of the Military Department concerned, that the case merits a waiver;
- A brief summary of all waivers submitted to the Secretary of Defense or the Secretaries of the Military Departments will be provided to the DASD(S&IO), OASD(C3I) on a quarterly basis, to arrive by the 15th of the month following the end of each quarter of the calendar year. Each summary, as a minimum, should include reference to the provision involved ((1) or (4)), the nature and date of the offense, the sentence imposed, the meritorious circumstance cited in support of the waiver and the result of the request. OASD(C3I) will compile the final report to Congress by February 1 for the previous calendar year in coordination with General Counsel of the Department of Defense. Quarterly reporting will be effective for the first full calendar year quarter following the date of this memorandum;
- The quarterly summary shall also include the number of cases which, under normal circumstances, would have otherwise resulted in a favorable adjudicative outcome but did not due to the imposition of the statutory provisions;
- This policy does not apply to conversions/transfers/reinstatements of current DoD security clearances, including transfers of clearances of employees within the Department of Defense, clearances of employees who fall under the National Industrial Security Program, and transfers of clearances to the Department of Defense of employees coming from other Federal agencies. The policy does apply to all initial determinations to grant clearances or accesses and determinations to continue clearances/accesses following a reinvestigation, including both periodic reinvestigations and investigations initiated for other reasons;
- The policies contained in this memorandum apply to all pending cases in which a final decision has not been issued as of the date of this memorandum.

GUIDELINE H

Drug Involvement

The Concern:

a. Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

b. Drugs are defined as mood and behavior-altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) Inhalants and other similar substances.

c. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Conditions that could raise a security concern and may be disqualifying include:

a. Any drug abuse (see above definition);¹

b. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

c. Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;¹

d. Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

e. Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

¹ Under the provisions of 10 U.S.C. 986, any person who is an unlawful user of, or is addicted to, a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), may not be granted or have renewed their access to classified information.

Conditions that could mitigate security concerns include:

- a. The drug involvement was not recent;
- b. The drug involvement was an isolated or aberrational event;
- c. A demonstrated intent not to abuse any drugs in the future;
- d. Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

GUIDELINE 1

Emotional, Mental, and Personality Disorders

The Concern: Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupational functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual's mental health care provider.

Conditions that could raise a security concern and may be disqualifying include:

- a. An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;¹
- b. Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;
- c. A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;
- d. Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

Conditions that could mitigate security concerns include:

- a. There is no indication of a current problem;
- b. Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission, and has a low probability of recurrence or exacerbation;
- c. The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.

¹ Under the provisions of 10 U.S.C. 986, any person who is mentally incompetent, as determined by a credentialed mental health professional approved by the Department of Defense, may not be granted or have renewed their access to classified information

GUIDELINE J

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- c. *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year;*¹
- d. *Discharge or dismissal from the Armed Forces under dishonorable conditions;*²

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- e. Acquittal;
- f. There is clear evidence of successful rehabilitation.
- g. *Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.*

¹ Under the provisions of 10 U.S.C. 986 (P.L.106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.

² Under the above mentioned statute, a person who has received a dishonorable discharge or has been dismissed from the armed forces may not be granted or have renewed access to classified information. The same waiver provision also applies.

Smith Amendment (Report & Bill Language)

Limitation on granting of security clearances (sec. 1071)

The Senate amendment contained a provision (sec. 1074) that would prohibit any officer, employee, or contractor of the Department of Defense, or any member of the armed forces, from receiving a security clearance if that person: (1) has been convicted in any court within the United States and sentenced to imprisonment for a term exceeding 1 year; (2) is an unlawful user of, or addicted to any controlled substance; (3) is currently mentally incompetent; or (4) has been discharged from the armed forces under dishonorable conditions.

The House bill contained no similar provision.

The House recedes with an amendment that would authorize the Secretary of Defense or the secretaries of the military departments to waive this provision in meritorious cases for persons who would otherwise be prohibited from receiving a security clearance. (p. 853)

SEC. 1071. LIMITATION ON GRANTING OF SECURITY CLEARANCES.

(a) IN GENERAL.—Chapter 49 of title 10, United States Code, is amended by adding at the end the following new section:

"§ 986. Security clearances: limitations

"(a) PROHIBITION.—After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

"(b) COVERED PERSONS.—This section applies to the following persons:

"(1) An officer or employee of the Department of Defense.

"(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

"(3) An officer or employee of a contractor of the Department of Defense.

"(c) PERSONS DISQUALIFIED FROM BEING GRANTED SECURITY CLEARANCES.—A person is described in this subsection if any of the following applies to that person:

"(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

"(2) The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

"(3) The person is mentally incompetent, as determined by a mental health professional approved by the Department of Defense.

"(4) The person has been discharged or dismissed from the Armed Forces under dishonorable conditions.

"(d) WAIVER AUTHORITY.—In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

"(e) ANNUAL REPORT.—Not later than February 1 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report identifying each waiver issued under subsection (d) during the preceding year with an explanation for each case of the disqualifying factor in subsection (c) that applied, and the reason for the waiver of the disqualification."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"986. Security clearances: limitations."